IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners,*

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents.*

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID H. GETCHES
L. GRAEME BELL, III
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, D.C. 20036
Counsel for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners,*

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents.*

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS CURIAE

Petitioners and Respondents have filed with the Clerk of the Court a written stipulation consenting to the filing of this brief.

Amicus, Native American Rights Fund, is a non-profit corporation providing legal representation and

counsel to Indians and Indian tribes throughout the country in cases of major significance. The Fund is supported principally by private grants and contributions. Because its clients will be denied any judicial forum to litigate claims for land of which they are dispossessed if the decision of the Court below is allowed to stand, the Fund, and its clients, have a considerable interest in the outcome of this case.

STATEMENT

The decision below of the Second Circuit Court of Appeals affirms the ruling of the United States District Court for the Northern District of New York which dismissed the case for want of federal court jurisdiction.

The Oneida Tribes of New York and Wisconsin brought the suit for the rental value for years 1968 and 1969 of lands taken from the Tribes in 1795 allegedly in violation of federal law (the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. § 2116, and now 25 U.S.C. § 177). The jurisdiction of the district court was founded on 28 U.S.C. § 1331 and § 1362 and other statutes not now in issue. In affirming the dismissal of the case, the Court of Appeals reasoned that the suit was one "basically in ejectment," and therefore a well-pleaded complaint need not contain an allegation of the Oneidas' source of title, but need only allege that the Tribes are the owners, in fee, of the lands in dispute. *The Oneida Indian Nation of New York State* v. *The County of Oneida, New York,* 464 F.2d 916 (1972). The "well-pleaded complaint rule" has developed over many years as an interpretation of 28 U.S.C. § 1331, specifically as a test of whether a case "arises under the Constitution, laws or treaties of the United States."

The court below, without analysis, concluded that this rule attaches to the same "arising under" language contained within 28 U.S.C. § 1362. Judge Lumbard, in his dissent, noted that the "arising under" language of § 1362 should not, of necessity, be burdened with the restrictive interpretation given to the same language in § 1331.

REASONS FOR GRANTING THE WRIT

Amicus concurs with the reasons for granting the Writ for Certiorari asserted in the Petition. In this brief, *amicus* emphasizes the consequences of the decision below on Indian tribes throughout the country and asserts an additional argument for this Court to grant the Writ.

AS A RESULT OF THE DECISION BELOW, INDIAN TRIBES HAVE NO JUDICIAL FORUM TO LITIGATE CLAIMS FOR LAND OF WHICH THEY ARE DISPOSSESSED

Because of the restrictive interpretation given by the Court of Appeals to 28 U.S.C. § 1362, the Oneida Tribes are precluded from litigating in federal court their claim for lands taken from them in 1795. As the court below recognized in Footnote 9 (464 F.2d 916 at 923), the Oneidas may not bring their suit in the state courts of New York. Since the challenged transaction by which the Oneidas were dispossessed occurred in 1795, the New York courts are barred from entertaining the Oneidas' suit by the following provision of 25 U.S.C. § 233:

> that nothing herein shall be construed as conferring jurisdiction on the courts of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

The lack of a judicial forum is not a legislative oversight which will prejudice only the New York tribes. 28 U.S.C. § 1360 and 25 U.S.C. § 1322 impose on certain states, and permit other states to assume, civil jurisdiction over actions to which Indians are parties. Both statutes contain the same proviso that the state jurisdiction therein authorized or imposed does not confer on the states jurisdiction to adjudicate the ownership or right to possession of property held in trust by the United States for Indians or property subject to a restriction against alienation imposed by the United States (28 U.S.C. § 1360(b); 25 U.S.C. § 1322(b)). These provisos, and the similar language in 25 U.S.C. § 233, are codifications of judicial decisions reserving exclusively for federal courts the jurisdiction to hear claims involving the right to or possession of Indians lands. *U.S.* v. *Minnesota,* 305 U.S. 382 (1938); *Williams* v. *Lee,* 358 U.S. 217 (1959); *see* Footnote 9 to Judge Friendly's opinion below (464 F.2d 916 at 923).

Consequently, absent diversity jurisdiction pursuant to 28 U.S.C. § 1332, the interpretation of 28 U.S.C. § 1362 rendered by the Court of Appeals in this case will close *all* judicial doors to Indian tribes asserting claims for land of which the tribes do not have possession.

THE COURT OF APPEALS' INTERPRETATION OF 28 U.S.C. § 1362, NOT CONSTITUTIONALLY COMPELLED, RAISES SERIOUS CONSTITUTIONAL PROBLEMS

The dire consequences of the Court of Appeals' decision, as described above, militate for review of that decision by this Court. In addition, this Court should issue the Writ because the decision interpreting 28

U.S.C. § 1362 to include the "well-pleaded complaint rule" raises constitutional problems.

The court below transposed the "well-pleaded complaint rule" of 28 U.S.C. § 1331 to the same statutory phrase in 28 U.S.C. § 1362. But this transfer of statutory interpretation was not constitutionally compelled. As Judge Lumbard states in his dissent, "The 'arising under' language of the Constitution, § 1331, and § 1362 is virtually identical, yet the grant of jurisdiction under §1331 has long been considered less generous than the Constitutional grant. Compare *Osborn* v. *Bank of the United States,* 9 Wheat. 739 (1824), with *Louisville & Nashville R.R. Co.* v. *Mottley,* 211 U.S. 149 (1908), and *Louisville & Nashville R.R. Co.* v. *Mottley,* 219 U.S. 467 (1911)." 464 F.2d at 924.

By adopting, nonetheless, the "well-pleaded complaint rule" to dismiss the case, the court below cast constitutional doubt over 28 U.S.C. § 1360(b), 25 U.S.C. § 1322(b) and 25 U.S.C. § 233 which deny state court jurisdiction in suits such as in the instant case.

The due process clause of the Fifth Amendment has long been read to guarantee at least some judicial forum for aggrieved citizens. *Truax* v. *Corrigan,* 257 U.S. 312 (1921). More recently, Justice Harlan, speaking for this Court, stated:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. *Connecticut,* 401 U.S. 371, 373 (1971). Justice Harlan was speaking of the due process clause of the Fourteenth Amendment, but the demands of the

Fourteenth Amendment clause are no less stringent than the demands of the due process clause of the Fifth Amendment. *Bowles* v. *Willingham,* 321 U.S. 503 (1944). These statutes may also be infirm as violations of the constitutional guarantee of equal protection of the laws applicable through the Fifth Amendment to the activities of the federal government. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). If the decision below is allowed to stand, disallowing a federal court forum in which to litigate land claims of Indian tribes out of possession of the disputed land, the federal statutes denying a state court forum for such claims arguably discriminate invidiously against Indians, and such a racial classification is inherently suspect. *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964).

This Court has often cautioned that a statute should always be interpreted with an eye to avoiding constitutional infirmities or doubts. *Crowell* v. *Benson,* 285 U.S. 22 (1932); *Ullmann* v. *United States,* 350 U.S. 422 (1956). Indeed, the Court in *U.S.* v. *Rumely,* 345 U.S. 41 (1953), stated that statutory words may be strained "in the candid service of avoiding a serious constitutional doubt." 345 U.S. 41 at 47. The Court of Appeals, we submit, ignored this caution and interpreted 28 U.S.C. § 1362 in such a way as to give birth to constitutional problems.

Consonant with the above cited cases, this Court should review the Court of Appeals' decision to ascertain if such constitutional problems may not be avoided. Petitioner, and *amicus,* maintain that the legislative history of 28 U.S.C. § 1362 does not warrant the interpretation given to that statute by the Court of

Appeals,* and that, without straining the language of the statute, it may be and should be interpreted so the constitutional doubts will fade.

CONCLUSION

Because of the dire consequences of the decision below on the availability of judicial redress for Indian tribes throughout the country, and the serious constitutional problems generated by the decision, *amicus,* Native American Rights Fund, joins with the petition-

---

* In recommending the enactment of what is now 28 U.S.C. § 1362, the Judiciary Committee of the House of Representatives noted that:

> "In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases, it is appropriate that the actions be brought in a U.S. district court." House Report No. 2040, 89th Cong., 2nd Sess., (Oct. 3, 1966), p. 3146.

The Oneida complaint presents exactly the fact pattern which the above language demonstrates was intended by Congress to fall within the ambit of 28 U.S.C. § 1362. Furthermore, this same Committee was cognizant that federal courts have jurisdiction over suits brought by the United States as trustee for Indians or Indian tribes (28 U.S.C. § 1345), and that, for a variety of reasons, the United States declines to litigate some Indian actions. The Committee envisioned this bill as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought on their behalf by the government or by their own attorneys." House Report No. 2040, 89th Cong., 2nd Sess. (Oct. 3, 1966), p. 3147.

ing Tribes in requesting this Court grant the Writ of Certiorari.

Respectfully Submitted,

DAVID H. GETCHES
L. GRAEME BELL, III
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, D.C. 20036
Counsel for Amicus Curiae